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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 397

DUKE POWER COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY,

Petitioners,

vs.

GREENWOOD COUNTY AND E. L. BROOKS, S. A. AGNEW AND E. I. DAVIS, MEMBERS OF AND CONSTITUTING THE FINANCE BOARD OF GREENWOOD COUNTY, AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS,

Respondents.

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REPLY BRIEF FOR PETITIONERS

I.

The right of the petitioner to invoke a judicial examination of the constitutionality of Title II of the National Industrial Recovery Act and of the validity of the gift and loan of federal funds, as the same affect petitioner, is clear.

Respondents contend petitioner is without standing to subject the constitutionality or validity of the Administrator's action to judicial examination. They assert it is necessary that, in order to sustain its right to maintain this action, petitioner must show it would suffer a "direct injury as a result" of the Administrator's action. (Cts. Br. pp. 25-26). That petitioner would sustain such an injury is clear upon the

record (Pet. Br. pp. 8-12, 72-7) and it is submitted upon respondents own statement petitioner's right to sue is therefore established.

Respondents attempt to avoid the effect of these facts by arguing that the project may dispose of its product to customers not now served by petitioner. They point out that petitioner now serves only from 8 to 15 percent of the power requirements of Greenwood County. But while this is true, the fact is that the customers with which contracts have been made and the customers listed as prospective, are, with minor exceptions, precisely the same customers now served by petitioner. (R. 177, 691, 697, 340-1). Rates were fixed below petitioner's rates in order to attract petitioner's customers, (R. 696) and the business which the project would serve is business now served by petitioner.

It seems manifest that only the most compelling reasons could lead the Court to conclude that where it is plain that a citizen's property is being irreparably injured or destroyed by the action of a Government official, the citizen is without right or standing to invoke a judicial determination of the justification of the officer, if any, for so doing. Yet it is clear that if the respondents are right, any appropriation, no matter how injurious or unlawful, is, for all practical purposes, immune from judicial review; for practically the only person who could object to an unconstitutional disposition of money from the Federal Treasury would be the donee; and since he would have a complete remedy by refusing the gift, the use of public funds for unlawful purposes would be substantially without check. It is an open secret that many of those who seek an extension of federal power not countenanced by the Constitution look eagerly to the use of the spending power as a means for circumventing constitutional restrictions. If a rule is to be adopted which for all practical purposes prevents a citizen, whose property is inescapably to be destroyed by an exercise of that spending power, from taking the judgment

of the National Courts on whether his property is being lawfully taken or destroyed under the Constitution, not only is the threat to the institution of private property appalling, but the theory that the exercise of Federal power is to be confined within the limits prescribed by the Constitution becomes wholly illusory. If the exercise of the spending power is immune from judicial review to the extent claimed by the respondents in this case, then the spending power furnishes the means for carrying on every activity forbidden to the Federal Government and reserved to the states without fear or restraint by the courts so long as the state acquiesces.

Respondents' Theory of the Nature of a Suit against a Federal Officer.

The fundamental proposition upon which the entire argument of the respondents rests is: A citizen may not maintain a suit against the Administrator to prevent irreparable injury to his property or other rights through the unconstitutional perversion of the powers of government, unless the citizen states a cause of action against the Administrator as a private individual apart from any pretense or ability to exercise or bring to bear the powers of government to the injury of the citizen. Stated concretely, the contention is: It is necessary that petitioners state a cause of action against the Administrator as a private individual, and since the Administrator *might* lawfully give or loan his own money to Greenwood County for the construction of an intrastate electric utility to compete with the petitioners, the petitioners state no cause of action. In other words, it is argued that the petitioners have no standing to raise the questions whether the Administrator is in fact violating a Federal statute under which he assumes to act, or whether that statute is void and consequently no justification of his action. The argument of respondents rests (1) upon a misconception of the law, and (2) upon a misstatement or misinterpretation of the facts.

Respondents rest their legal position upon *Poindexter v. Greenhow*, 114 U. S. 270 and upon *Ex parte, Ayers*, 123 U. S. 443. In so doing they have, we think, confused the questions (1) whether a citizen has an interest which entitles him to maintain a suit, and (2) whether, conceding the existence of that interest, the suit is nevertheless not maintainable as one against the United States. In the Ayers case the sole question was whether the suit was in fact against the State of Virginia, although in form against certain individuals who were State officers. No question was raised or considered whether the complainants in the underlying suit out of which the *habeas corpus* action arose had any standing to maintain the suit, whatever its character. The question which the respondents really debate is under what circumstances a suit is one against a State or the United States so as not to be maintainable without its consent regardless of the justiciable interest of the complainant. All the cases cited by respondents involve either (1) the question whether under the facts of the particular case the suit, though in form against an officer, was in fact against the United States so as to make the United States an indispensable party; or (2) whether the act of the defendant official, charged to be unconstitutional or in excess of statutory authority, threatened any substantial special injury to the complainant. *Morrison v. Work*, 266 U. S. 481, 486, 488; *Frothingham v. Mellon*, 262 U. S. 447.

The fact is, that in practically every instance the only substantial threat of injury arises from the fact that the defendant is attempting unlawfully to use the power of the State or the Nation so as *irreparably* to injure the property or personal rights of the complainant. Viewed in that aspect, it would always be possible to say that the act would not be effective except through the use of power of the State or the Nation and that, therefore, it must be regarded as an official act and a suit against the State or Nation, and, therefore, not maintainable. And viewed purely as the act of a private individual

not acting under color of office or statutory authority, there would ordinarily be no substantial threat of injury.

In any event, the compelling necessity, that only by permitting suits against Federal officers could the constitutional rights of citizens or our constitutional form of government be preserved, led to the adoption of the practical view and the realistic principle that such a suit is against the officer as an individual or in his private capacity and not against the nonconsenting State. To construe that principle in such a fashion as to defeat the purpose for which it was developed would obviously be inadmissible; and whatever may be the refinement of underlying legal theory, the principle is well settled that whenever an officer undertakes under color of a State or Federal statute to use the power of the State or Nation unlawfully and unconstitutionally so as to inflict or threaten a special and irreparable injury upon the property or rights of the citizen, that citizen may turn to the courts for redress. The respondents, we think, concede away their whole argument on this point when they attempt to distinguish cases like *Philadelphia Co. v. Stimson*, 223 U. S. 605 and *Ex parte Young*, 209 U. S. 123, by arguing that a private individual could be sued under the circumstances there presented if authorized by statute to do the act complained of. (Admr. Br. in Nos. 84 and 85, p. 96. But obviously the power exerted by such an individual is the power of the State or Nation as conferred by the statute—the same power as that exerted by an officer, if in fact such an individual is not at least a de facto officer. Without this power the individual could not be sued as there would be no threat of injury. Whether the question at issue is one of the right to sue or whether the suit is against a nonconsenting sovereign, the respondents concede, as they must under repeated decisions of this Court, that where an individual is threatening unlawfully and unconstitutionally to use the power of the State or Nation to inflict an irreparable injury upon the citizen, the citizen has a right to redress. It is difficult to see why the

threat to use the *power* of the State may be restrained but the threat to use the *money* of the state to inflict a like injury is immune!

In *Philadelphia Co. v. Stimson*, supra, the defendant was charged (1) with creating a cloud upon the title of complainant's real estate by acting in excess of statutory authority or under an unconstitutional statute in laying out harbor lines at Pittsburgh, and (2) with threatening to bring criminal prosecutions in the name of the United States if the complainant used its property in disregard of such pretended harbor lines. Manifestly, treating the suit as one against a private individual, apart from, in disregard of and unaffected by his official position and duty or his ability as a Federal officer to bring to bear the power of the Federal Government, the fact that he, as a private individual, had purported to promulgate harbor lines at Pittsburgh could constitute no cloud upon the complainant's title. Under a similar assumption, any threat that he would prosecute the complainant criminally in the name of the United States would have been equally fanciful and would have stated no cause of action. But the fact that this was not the act or threat of a private individual, but the act and threat of a public officer having the means and the announced intent by virtue of his office to pervert and bring to bear the powers of Government to injure or destroy the rights of the citizen, did give the citizen a standing to challenge the defendant's action. The rule of the *Stimson* case has been frequently applied in this Court and the lower Federal Courts. *Pierce v. Society of Sisters*, 268 U. S. 510; *Truax v. Raich*, 239 U. S. 33; *Public Service Co. v. Corboy*, 250 U. S. 153, 159; *Looney v. Crane Co.*, 245 U. S. 178, 191; *Hammer v. Dagenhart*, 247 U. S. 251; *Hill v. Wallace*, 259 U. S. 44; *Chastleton Corp. v. Sinclair*, 264 U. S. 543; *Wilson v. New*, 243 U. S. 332; *Fort Smith and Western Ry. et al. v. Mills*, 253 U. S. 206; *Street v. Lincoln Safe Deposit Co., et al.*, 254 U. S. 88; *Lion Laboratories v. Campbell, Federal Prohibition Administrator*, (C.C.A. 2, 1929) 34 F. (2d) 642.

The two greatest powers of government are "the sword and the purse." *McCulloch v. Maryland*, 4 Wheat. (17 U. S.) 316, 407-8. Here the defendant Administrator, by virtue of his power under the statute, threatens to use the "public purse"—to bring to bear the weight of the public Treasury—to accomplish the irreparable injure if not destruction, of the property and business of the petitioner. He threatens to use the force of one of the two greatest powers possessed by the Federal Government in such a fashion as unlawfully and unconstitutionally to inflict an irreparable injury upon the property rights of the petitioner. Hence, even on the respondents own theory, the right of the petitioner to sue is plain.

The theory of the respondents is untenable for the further reason that it rests upon a misstatement or misinterpretation of the facts. It proceeds upon the assumption that in a suit against an officer to enjoin unconstitutional action, the complainant must show that if the officer were doing the thing complained of as a private individual and without making any use of the powers of government, he would be liable.[1] This would not only require the Court to assume a non-existent case and disregard the facts but also to substitute falsehood for fact. The question before the Court for determination is whether the defendant Administrator may so use and pervert the powers of government and not what he might do as a private individual. The Administrator is not in fact giving his own money away. He is in fact using money out of the Treasury of the United States. Yet the Court is asked to treat the Administrator's action the same as though he were taking his private funds to make a gift or to engage in a legitimate enterprise. To say that the case should be treated as merely stating a case against the Administrator for giving away his own

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1) This, as hereinafter shown, involves not merely assumptions contrary to the fact but also the thesis that one who undertakes to perform the obligations of a public office thereby assumes no duty, even in relation to the discharge of the functions of his office, which does not rest upon him as an individual in the conduct of his personal affairs.

money would be to ignore and utterly disregard all constitutional limitations imposed on public officials for the protection of the citizen and his property rights. The Court is asked to place itself in the position of assuming fiction for fact to the end that one who has assumed a public office and sworn to obey the Constitution of the United States shall not be called to account for the violation of his duty. The growth of bureaucracy and the insistence of bureaucracy that citizens have no right to demand an explanation or a justification for the taking of their property or the invasion of their rights is perhaps the most disturbing trend of modern government.

Respondents' application of Their Theory of the Nature of a Suit Against a Federal Officer to the Case at Bar.

Relying upon their erroneous proposition that it is necessary for petitioner to state a cause of action against the Administrator individually in order to maintain this action, respondents then argue that as petitioner cannot complain of lawful competition by Greenwood County, petitioner is without standing to sue. This argument proceeds upon a misstatement of the facts, the basis of the suit and the relief sought. The Bill did not seek to prevent lawful competition by Greenwood County and a decree in petitioner's behalf would leave the County as free to thereafter engage in lawful competition as it was before. The object of this suit and the scope of the decree sought are merely to enjoin the respondents from unconstitutionally and illegally taking money out of the Treasury of the United States to subsidize the construction of a competing utility in Greenwood County.

While petitioner has no right to be free of lawful competition by Greenwood County, it does not follow that the petitioner has no right to be free from damage caused and made destructive by the unconstitutional gift and loan of Federal funds. Because petitioner has no right to be free from damage by lawful competition by Greenwood County, it does not

follow that petitioner has no standing to have the other question determined. If petitioner's special injury is proximately caused by the use of Federal funds, it clearly has the right to have the validity of such use determined. The respondents do not attempt to meet the argument in petitioner's brief that the Administrator's action is the cause of the admitted injury or damage to petitioner, (Pet. Br. 72-77) nor can they avoid the findings by the district court both on the original hearing and on the retrial, that the Greenwood project would not be built were it not for this aid to be supplied by the Administrator. Likewise respondents wholly fail to meet the argument in the petitioner's brief which clearly shows that where, as here, one commits an unlawful act, he may not escape liability for injuries inflicted upon a third party because he has utilized an intervening agency which would have had the right, uninfluenced by his unlawful act, to do the thing which caused the damage. None of the cases cited on pages 66-68 of the Administrator's brief in Nos. 84 and 85 are apposite to the question under discussion. If the petitioner were seeking to enjoin Greenwood County from entering into competition, such cases would be relevant but here they can only serve to confuse the issue. That the cases cited by the Administrator on pages 78-82 of his brief in Nos. 84 and 85 do not support his position has already been pointed out by petitioner. (Pet. Br. pp. 83-6).

Nor do the National Bank Cases cited by the respondents sustain their position. In those cases the plaintiffs were denied the right to put in question the charter authority of the banks. As stated in *Schuyler National Bank v. Gadsden*, 191 U. S. 451, the point at issue as to each bank was "the question as to the violation of its charter" and could be raised only by the government in a direct proceeding for that purpose. This limitation of those entitled to raise the question of ultra vires under a corporation charter was also the question involved in *Railroad Company v. Ellerman*, 105 U. S. 166. (Pet. Br. pp. 83-4).

Relying upon these cases respondents argue that the petitioner has no right to sue because, as they contend, the petitioner would have no right of action against the Administrator if he, acting as the president of a bank or railroad, would make a loan and gift to Greenwood County in excess of his powers or of the powers of the bank or railroad and that the same principle applies to unconstitutional action by a Federal officer as to the ultra vires act of a corporation or a corporate officer. That conclusion is a plain *non sequitur*. The argument requires the Court either (1) to pretend that it is considering the right of the petitioner to question a gift or loan of the funds of the Administrator or a private corporation instead of the right of a citizen to redress for special injury caused by the unconstitutional use of Federal funds; or (2) to hold that no right of petitioner is violated when the Administrator unlawfully exerts the powers of the government in such a way as irreparably to injure petitioner's property. The distinction between the duty of a Federal officer, exerting the powers of the government, and the duty of a private corporation, its officers and directors, not to act in excess of charter limitations, is too obvious to be confused.

The respondents wholly fail to distinguish *Pierce v. Society of Sisters*, 268 U. S. 510, and similar cases. In these cases they confuse the issue of the unlawfulness of the threatened action with the question of whether that action would be the proximate cause of the plaintiff's injury. In the Pierce case, the State officers were threatening to use the power and force of the State unlawfully and in such fashion as to bring about an injury to the complainant. Here the defendant Administrator is threatening to use the power of the Federal Government. In the Pierce case, the threat of the defendants to bring criminal and other proceedings against the parents of school children in the name of the State, would have constituted no actionable wrong had the defendants not been State officers and in a position to carry out their threats under color of such office. Similarly here, the act of the de-

fendant Administrator in selecting the plant for construction as a public works project and his threat to take $2,800,000 out of the Federal Treasury and give it to Greenwood County with which to construct the competing plant would state no cause of action but for the fact that the Administrator is in a position, under color of office, and under color of an unconstitutional statute, to make his action effective.

II.

The two lower courts did not find against petitioner's contention that the project was approved as a Public Works Project and funds allotted for its construction for the unauthorized purpose of reducing local electric power rates; and the rule as to a concurrent finding by two lower courts cannot be invoked by Respondents.

Counsel for the County and its officials contend "that where the findings of fact by a District Court are concurred in by the Circuit Court of Appeals they will not be *reviewed* by this Court, and will be accepted unless clear error is shown." (County's Br. pp. 4, 5; Italics Supplied).

Counsel for the Administrator rely upon "the established practice of the court *** (that) concurrent findings will not be *disturbed* unless clear error is shown." (Administrator's Br., p. 29; Italics Supplied).

Counsel for the Administrator, go further, saying:

> "Indeed, it is doubtful whether petitioner, in view of its limited specification of errors, is in a position to raise any question with respect to the findings of fact." (Administrator's Br., p. 29).

These positions, we submit, are untenable for the following reasons:

FIRST. There was no concurrent finding of fact by the two lower courts against petitioner's contention that the reduction of local electric power rates was the controlling consideration

and determining factor in the approval of this project by the Public Works Administration, and in the allotment of funds for its construction.

On the contrary, as we pointed out in our opening brief, (pp. 29-32), the trial court found that the project was approved and the allotment made pursuant to the PWA power policy to force down rates. (R. 774).

Judge Glenn first stated petitioner's contention as follows:

> "The plaintiff contends that the evidence is admissible because it tends to show that the Administrator and his assistants, charged with large responsibility, had adopted a course whereby they set up the rate question as a criterion to determine whether or not a loan and grant should be made in a specific case." (R. 772).

He then definitely and categorically stated:

> "Regardless of its effect on the final decision of the case *we think that the evidence in this regard is admissible and that it shows exactly what the plaintiff contends that it shows.*" (R. 774) (Italics supplied).

As we endeavored to point out in our opening brief, his findings on page 788 of the record is, and—in view of the clear and unqualified statements contained in his opinion—must be construed (construing it most favorably to respondents) as—a mixed finding of fact and conclusion of law, based upon a supposed change in the power plan of the Administrator which, if it ever occurred, occurred long subsequent to the approval of this project and the allotment of funds for its construction; and upon the Judge's apparent view that this supposed change could be given the retroactive effect of curing the illegality of the action of the Public Works Administration in this case which took place long prior to the supposed change.*

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* The importance and significance of the opinion of a district court in disclosing the grounds of its decision is stated and emphasized in Virginian R. Co. v. United States, 272 U. S. 658, at page 675.

As we further endeavored to point out, there was no such change. And if there had been a change it could not be given the retroactive effect of curing the prior action in this case. There was no new approval of the project and no new allotment of funds for its construction after the supposed change. As Judge Glenn found, the determining factor in the approval of this project, and in the allotment of funds for its construction, was the reduction of rates. It was approved and the funds allotted during the period when, as he found, the rate test was the controlling consideration. (R. 773-4).

SECOND. Not even the majority opinion of the Court of Appeals, as we read it, found against petitioner's contention with respect to the controlling consideration and determining factor which governed the Public Works Administration in approving the instant project and in allotting funds for its construction.

On this point the majority of the Court of Appeals said, at page 855 of the record:

> "It is the contention of plaintiff that the loan and grant were made to the county by the Administrator for the purpose of affecting the rates charged by plaintiff for electric power, and at all events, that the inevitable effect of the construction of the project will be to lower rates in the territory in which plaintiff operates; and much testimony was adduced as to the policy of the Public Works Administration in approving loans and grants for power projects. As to this it appears that the Electric Power Board or Review which was set up in 1933, but which was abolished by order of the Administrator on March 16, 1935, did have a policy with respect to approving loans to municipal power projects to the effect that such projects should meet standards of social desirability, as well as engineering soundness and reasonable security. Social desirability, under this policy, depended among other things upon whether or not the municipal project would provide current at rates substantially less than

those at which it was provided by an existing utility; and, in cases where such utility would lower its rates to meet those proposed by the municipality, the policy was not to approve the municipal project."

Again, on page 856, the majority said:

"that, in the beginning, much emphasis was placed upon the social desirability of lowering power rates to the public; but that, after the policy of the Public Works Administration had been attacked on the ground that, by attempting to bring about lower power rates, it was interferring with a matter reserved to state control, this emphasis on 'social desirability' of lower rates has been largely abandoned and the consideration of competitive rates has been had with reference to the financial security of the loan rather than the 'social desirability' of the enterprise, the lowering of rates being regarded as an incidental result of the policy of making such loans and grants and not as one of the chief purposes thereof."

Thus the majority of the Court could not escape the conclusion, so clearly established by the record, that the rate test was the determining factor with the Public Works Administration in the approval or disapproval of competing municipal power plants, certainly at the time of the approval of the instant plant.

The statement on page 856, that subsequent to the approval of the instant plant emphasis was taken off "the social desirability of lowering power rates to the public," and the same objective accomplished by "the consideration of competitive rates * * * with reference to the financial security of the loan," merely indicates a variation in the method of accomplishing the same objective.

On this point the accuracy of what Judge Soper said, in the paragraph of his opinion beginning at the bottom of record page 875, although contained in a dissenting opinion, cannot be successfully challenged. Judge Soper there said:

"It is true that since the decision of Judge Watkins in the court below, 10 F. Supp. 854, 12 F. Supp. 70, and the decision in *Arkansas-Missouri Power Co. v. City of Kennett*, 78 F. (2d) 911, which pointed out the illegality involved in the practices of the Administrator, an attempt has been made to repudiate the public statements concerning the policies of the Administration, which had been frequently and publicly made by subordinate officials; but these statements conformed so closely to the announcements of the Administrator that the attempt to abandon them amounts to little more than an expression of regret that what had been so widely proclaimed as a praiseworthy public policy had become a source of danger to the establishment of municipal power projects. The District Judge found that there was in fact a change in the policy of the Administrator after he became doubtful of the validity of his prior acts, but so far as the proposal of Greenwood County is concerned, *there was no change that affects the finding of fact that it was approved because it met the requirement that it would bring down the rates of the established local utility.* The original contract of December 8, 1934 was revised on November 30, 1935, so as to include a paragraph denying to the Administrator and the Government the right or power to govern the rates to be fixed or charged for the services afforded by the project, excepting such rights as the Government might have as a holder of the municipal revenue bonds; but no new application for the loan and grant was made by the County, no new resolution of approval of the project by the Public Works Administration was given, and no change was made in the rates to be charged by the projected plant which had been adopted prior to the execution of the first contract and had received the approval of the Administrator. In

> fact, the County adopted a new resolution on December 6, 1935 by which the original rates were confirmed. The change in the contract was obviously made to meet, if possible, the legal objection that had been raised; but no change was made in the unauthorized and invalid condition upon which the proposal had been approved." (Italics supplied).

THIRD. Furthermore, Judge Glenn, in making the finding or conclusion relied on by respondents, seems to have adopted the legal contention of respondents that even though the allotment was made pursuant to "a well thought-out plan * * * to control rates," this would not render the action of the Administrator invalid. (R. 774). We endeavored to answer this contention in our opening brief. (pp. 41-2).

Respondents in their brief, in support of this contention, rely upon *Sonzinsky v. United States*, 300 U. S. 506, and the line of cases of which it is representative. These cases merely hold that the court in passing on the validity of a statute within an acknowledged power of Congress will not consider the reasons which may have influenced Congress and its members in passing the statute. No such question is here presented. The question here is whether the Administrator is acting within the confines of the authority delegated to him by Congress. Congress delegated the authority granted the Administrator and appropriated the funds placed at his disposal for the accomplishment of the national purpose of relieving unemployment. This purpose is clearly declared in the statute. It is on the theory that the pursuit of this purpose will promote the general welfare of the nation that constitutional sanction for the statute is asserted. Admittedly the statute would be unconstitutional, if enacted for the purpose of reducing local electric power rates. The Administrator, we submit, in exercising the discretionary power delegated to him, and in using the funds placed at his disposal, must pursue the declared statutory purpose only. He cannot lawfully pursue

the unauthorized purpose of reducing local rates. Nor can he lawfully make the reduction of local rates a standard to guide him in the exercise of his discretion. That is an unlawful standard. Congress itself could not lawfully have made it a standard. And when his discretion is guided by that standard, his discretion is unlawfully exercised and his action invalid.

The contention of respondents, we think, comes down to this: that the Act permits the Administrator to use the funds appropriated and placed at his disposal for the accomplishment of any purpose that he, in his uncontrolled judgment, may deem advisable, provided only that he does create some work and give some employment. If this be true, and if the Act as so interpreted be constitutional, then the power of economic intervention into the affairs of private business, local as well as national, would for all practical purposes be unlimited. Such, we submit, is not the law. We think it is essential to the validity of a statute delegating discretionary power to an executive or administrative official that somewhere in the statute Congress prescribe adequate standards to guide and control the official in the exercise of the power delegated to him, and that the standards prescribed must be lawful standards, and must relate to a purpose within the constitutional reach of the federal government. If these standards are not expressly stated and prescribed in the statute, they will be found in the expressed purpose of the statute; when this purpose is expressed it is controlling, and the pursuit of any other purpose, unrelated to the statutory purpose, is unauthorized.

We think the true principle in construing a delegated authority is that it confers only a limited power on the grantee and that, especially where private property rights become involved, it is the duty of the courts to decide whether the grantee has acted within the limits of the delegated authority. It is true that private interests must within constitutional

limits give way to the public interest; but the public interest is seriously injured by acts which, though apparently in its favor, lead to the destruction of private interests and to individual injustices.

Respondents further contend that petitioner is seeking to invalidate the Administrator's action on account of his personal motive. Petitioner takes no such position. It does not suggest that the Administrator was actuated by any ill-will toward it; and it may be conceded that if his action were otherwise valid it would not be rendered invalid by any such ill-will, even if it existed.

The position of petitioner goes to the Administrator's authority to use the power delegated to him and the funds placed at his disposal for the unauthorized purpose of reducing power rates. See Judge Soper's opinion R. 877.

In *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139, the petitioner there did attack the order there involved on the ground that it had been prompted by improper motives on the part of the official issuing the order. The court held, "*if the order is justified by a lawful purpose*, it is not rendered illegal by some other motive in the mind of the officer issuing it." Petitioner here contends that the Administrator's action was not "justified by a lawful purpose." We repeat that petitioner does not even suggest the existence of an improper motive.

FOURTH. The contention that petitioner's specifications of error do not raise any question with respect to the findings of fact is untenable.

Petitioner duly assigned error to the trial court's findings of fact (R. 809-811); as well as to the failure of the trial court to make requested findings of fact (R. 811-814); and particularly assigned error to the trial court's finding No. XVIII on which respondents rely. (R. 810).

Petitioner in its petition for a writ of certiorari, in stating the specification of errors intended to be urged, stated:

"The errors assigned and intended to be urged by petitioner, should their petition be allowed, are set forth in their assignments of error. (R. 810-819, 831-2). The errors assigned raise the questions set forth in the foregoing statement of the questions presented." (p. 11 of Pet.).

In its opening brief petitioner stated that it "intends to urge the errors specified in its petition for writ of certiorari."

Certainly it was not necessary for petitioner to say that the questions were presented in their *factual aspects* as well as in their legal aspects. Of course they are presented as much in one aspect as in the other. The case is a suit in equity, and the writ of certiorari brings up the entire record for the review of the questions presented, the review extending to matters of fact as well as to matters of law. *Virginian R. Co. v. United States*, 272 U. S. 658, 675, 71 L. Ed. 463, 472; *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 444, 67 L. Ed. 731, 736; *Darlington v. Turner*, 202 U. S. 195, 50 L. Ed. 992; *Beyer v. Le Fevre*, 186 U. S. 114, 119, 46 L. Ed. 1080, 1082.

It may be noted further that both the petition for certiorari (p. 4), and petitioner's opening brief (p. 12), states that the Court of Appeals, in its holdings on the questions presented, erred "in the circumstances disclosed by the record." Furthermore, we think counsel for the County are in error in stating that this court will not *review* a finding of fact concurred in by two lower courts. This court has jurisdiction to review, and will review, such a finding in an equity cause. It will not, however, as we understand the rule, "disturb" such a finding unless error is shown either because the finding was based on an erroneous rule of law, or on an erroneous application of a correct rule, or was clearly against the weight of the evidence, but the court must *review* the finding in order to ascertain whether it is subject to any of these infirmities. It is this kind of review that petitioner seeks, if the findings of the lower courts may be interpreted as adverse to it.

III.

The Administrator's use of federal funds to construct a local hydro-electric plant in Greenwood County, S. C. is not within the powers conferred upon the Federal Government by the General Welfare Clause and is prohibited by the 10th Amendment.

The respondents here again attempt to avoid the issue by arguing the question whether Congress has power to appropriate Federal funds under the general welfare clause to relieve a national condition of unemployment. That issue is not here involved and the power is not questioned. But that end must be reached by constitutional means and methods; and the method under examination in this case is not constitutional. It must be remembered that the power to make appropriations for the general welfare is not an affirmative power to do anything. It is a power to appropriate and nothing more. To construe the provisions respecting taxation as authorizing any Federal governmental action involving the expenditure of tax monies that would have the indirect effect of promoting the general welfare, regardless of the means employed, would in effect make the general welfare clause a general grant of power and would open the door to wide encroachments on purely state affairs. For if the power to appropriate for the general welfare were construed as embracing an unfettered discretion in Congress to select any means to the end, the door would be opened leading directly to the serious impairment and ultimate destruction of the separate existence and independent self-government of the states. That this power cannot be so construed is well-settled. *United States v. Butler*, 297 U. S. 1.

In our previous brief we have shown that even though the general welfare clause be construed to authorize appropriations not in furtherance of the enumerated pow-

ers, the power of taxation and appropriation may nevertheless only be exercised for general not local, national not state, and public not private purposes, that mere multiplication of Federal excursions into matters of strictly local concern cannot convert them into matters of national concern or general welfare, and hence constitutional objects of Federal appropriations, that whether the object of such an appropriation is a constitutional Federal purpose must be determined by the nature of the *direct* object of the appropriation and not by any *indirect* or incidental effect and that under these principles the instant appropriation does not fall within the power given to Congress by the general welfare clause.

The argument of the respondents is based upon the simple expedient of inverting the direct object and the incidental effect of the appropriation under examination. It treats the claimed incidental effect of relieving unemployment as the direct object of the appropriation and the actual direct objective, that is, the construction of the intrastate utility, as an incidental and indirect effect. The position is manifestly untenable. No case cited by the respondents holds that the validity of an appropriation is to be determined by its indirect and incidental effects rather than its direct object. Nor can the respondents avoid the issue by charging, as they do, that the petitioner contends that no expenditure could be justified as in aid of the general welfare if made locally. It is unnecessary to say that the validity of the expenditure is not determined by the locality in which it is made but by the nature of the direct object of the expenditure. This again is a confusion and inversion of the direct object and the indirect and incidental effects of the appropriation and expenditure under examination. Nothing is more important than to maintain unimpaired the fundamental principle that the authority for all Federal action must be determined by its direct

object and not by incidental or indirect effects; for otherwise our dual constitutional system will be destroyed and merged in a central government of unlimited powers. *Schechter Corp. v. United States*, 295 U. S. 495, 546-8; *United States v. Butler*, 297 U. S. 1.

The respondents in form recognize the holding of this Court in *United States v. Butler*, 297 U. S. 1, that the spending power may not be used in such a fashion as to exercise any of the powers reserved to the States. But they attempt to avoid the effect of that decision upon the ground that the undertaking of the County is entirely voluntary. The question however, is whether the Federal Government is exercising powers reserved to the States and not whether it is exercising such powers with or without the consent of the State. Thus if the Federal Government would offer to pay every State $100,000,000 annually, if the State would surrender part or all of its reserved power, the acquiescense of a State would not defeat the Tenth Amendment and compel its citizens to submit to this exercise of Federal power forbidden under the Constitution.

The situation is in no way analogous to *Massachusetts v. Mellon*, 262, U. S. 477, as claimed by the respondents. That case dealt with a State which had never accepted the Federal offer. This case deals with the right of a citizen to immunity from an unlawful exercise of federal power.

Finally, the respondents attempt to justify the expenditure upon the ground that numerous appropriations, claimed to be similar to the instant one, have been made in the past. Many of the various types of appropriation listed by the Administrator were clearly for national objects, such as appropriations for forest fire prevention, public highways and the like. But in any event, such appropriations are without significance because their constitutionality was never tested in the courts. *United States v.*

Butler, 297 U. S. 1, 73. And certainly the argument fails to meet the objection here that the appropriation is being used for a purely state function and will result in the invasion of a field forbidden to the Federal Government by the Tenth Amendment.

IV.

The Commerce Clause, U. S. Constitution, Article I, Section 8, Clause 3, furnishes no constitutional basis for the Establishment of the project under color of the Authority of the National Industrial Recovery Act as proposed.

Counsel for the County take the position that the project will constitute an improvement of the Saluda River in aid of navigation, that it would affect interstate commerce, and hence that its establishment with federal funds, as contemplated, may be justified under the commerce clause, U. S. Constitution, Article I, Section 8, Clause 3. In support of the argument they call attention to the license issued by the Federal Power Commission permitting the construction of the project.

The argument, of course, must be predicated on the assumption that it is the Administrator who is seeking to establish the project, because manifestly the County, itself, would have no authority under the state statutes to construct a project in aid of interstate navigation.

We do not think, however, that the project can be classed as a navigation project, because all the evidence shows that it would be established for the sole purpose of engaging in the power business in the three Counties of Greenwood, Newberry and Laurens. It is true that a license has been obtained from the Federal Power Commission, but this license is merely a "permissive grant," and "is not a privilege to be exercised on behalf of the government." *Broad River Power Company v. Query*, 288 U. S. 178; *Susquehanna Power Company v. State Tax Commission*, 283 U. S. 291.

Saluda River itself is not navigable but is merely a tributary of waters below claimed to be navigable; and the purpose of the license was not to authorize the construction of a project in aid of navigation, but to permit the establishment of a power plant subject to such conditions as would prevent or minimize any possible injury to the navigable capacity of the streams below, and "protect the interests of the interstate and foreign commerce that would be affected." (See *Appalachian Electric Power Co. v. Smith*, 4 F. Supp. 6, 17, 67 F 2d 451, and cases cited.

The certificate of the Federal Power Commission (Respondent's Exhibit 4, R. 402), describes the project as "a waterpower project at the Buzzard's Roost site on the Saluda River, affecting lands in Greenwood, Newberry and Laurens Counties, South Carolina;" and the certificate further states:

> "It appears from the foregoing statements and quotations that the Saluda River is not navigable waters of the United States within the meaning of Section 3 of the act. It is unquestionably a non-navigable stream at and above the Buzzards Roost dam site and below the dam site to the head of the existing Saluda Reservoir (Lake Murray). There are no navigation locks at the Saluda Dam. The discharge at the Buzzard Roost site is estimated as ranging from a minimum of about 200 c.f.s. to a maximum of about 55,000 c.f.s. *The small low-water flow and the steep slope of the stream seem to preclude serious consideration of its improvement for navigation.*" (Italics supplied) (R. 404).

The certificate of the Power Commission contains no requirement of the installation of any facilities in aid of navigation.

The real purpose being to construct a power plant, the "permissive grant" or license of the Federal Power Commission cannot be successfully put forth in justification of the undertaking of the Administrator to construct the project with fed-

eral funds on the pretext that it would be a river improvement in aid of navigation.

But if the project could be classed as a navigation project, or as a combined navigation and power project, then it cannot be lawfully constructed under Title II of the National Industrial Recovery Act, because Sec. 202 of the Act (40 U. S. C. §402) contains the express provision "that no river or harbor improvments shall be carried out unless they shall have heretofore or hereafter been adopted by the Congress or are recommended by the Chief of Engineers of the United States Army."

Respondents introduced in evidence as their Exhibit No. 5 House Document No. 96, 73rd Congress, First Session (R. 406). This document contains a report from the Chief of Engineers to Congress on the Santee River system which embraces the Saluda River on which the Buzzard Roost project would be constructed. The report, therefore, includes and deals with the Buzzard Roost project (Page 69 of the report). The report was made to Congress under the provisions of House Document 308, 69th Congress, first session.

The Chief of Engineers did not recommend the development of Buzzard Roost as a navigation project.

The recommendations of the Division Engineer, as set forth on page 10 of the report, are as follows:

> "The navigable reaches of the Santee River and its tributaries are not in need of further improvement than is provided for by existing projects. The problem of flood control is local in character and does not affect Federal Interests. The cost of effective flood-control measures is larger than is economically justified. Future power development will have a beneficial effect on reducing flood heights. A number of undeveloped power sites in the upper watershed have economic value for commercial development, but Federal participation therein is not warranted. There is no need for irrigation. Further improvement by the Federal Government of the Santee Riv-

er and tributaries for navigation, flood control, power development, or irrigation, other than that already provided for by existing projects, is not recommended."

The report of the Division Engineer was in general concurred in by the Board of Engineers for Rivers and Harbors and by the Chief of Engineers; (page 3 of the report) and the recommendation of the Chief of Engineers, himself, is set forth on page 4 of the report where he states, "I am of the opinion that no improvement of this stream for navigation, either alone or in connection with power development, flood control, or irrigation, or any combination thereof, other than as authorized by existing projects, should be undertaken by the United States at the present time."

It would, therefore, seem to be plain that, if the project can be classed as a navigation project or as a combined navigation and power project, then, it neither having been adopted by Congress nor recommended by the Chief of Engineers, the action of the Administrator in seeking to establish the project under color of the authority of Title II of the National Industrial Recovery Act, is contrary to the express proviso contained in Section 202 of the Act which we have quoted.

This question has been so recently and fully dealt with by this Court in the case of *United States v. State of Arizona*, decided April 29, 1935, 295 U. S. 174, that extended discussion is unnecessary.

In that case, as stated in the opinion, the United States, acting through Harold L. Ickes, Secretary of the Interior and Federal Emergency Administrator of Public Works, had entered into a contract with the Metropolitan Water District of Southern California for the construction of Parker Dam on the Colorado River. The State of Arizona objected to the con-

struction of the dam and threatened to use force to stop the work. Whereupon the United States filed a bill in equity in the Supreme Court, perpetually to enjoin interference by the State. The question at issue was whether the Administrator had lawfully entered into the contract for the construction of the dam.

Among other statutory provisions relied upon by the United States in support of its claim that the dam was being lawfully constructed, was Section 202 of the National Industrial Recovery Act. The opinion states that:

> " . . . it is asserted that the Parker Dam project has been included by the Administrator in the comprehensive program of public works authorized by section 202, National Industrial Recovery Act, 48 Stat. 201 (40 USCA §402); that, pursuant to that Act, the Chief of Engineers of the United States Army has recommended the construction and his recommendation has received the approval of the Secretary of War."

The Court disposed of this contention as follows:

> "5. Plaintiff's contention that the dam is being built under authority of the Recovery Act is without force.
>
> *"The chronology just given,* when taken in connection with the citations in the contract of the Acts relied on, *shows the claim to be an afterthought born of the controversy disclosed by the complaint and about to be here submitted.* Section 25 of the Act of April 21, 1904, does not authorize this dam. Plaintiff does not assert that it was otherwise adopted by Congress." (Italics supplied).

It will be noted that in the Parker Dam case, the Chief of Engineers had recommended the construction of the dam, but the recommendation was made to the Administrator instead of to Congress. The Court held that this recommendation did not comply with the requirement of the National Industrial Recovery Act, because when that act was passed the phrase "recommended by the Chief of Engineers," when used in Acts of Congress relating to river and harbor improvements, had a well understood and definite technical meaning; that it meant a recommendation made to Congress only after preliminary examinations followed by surveys, the making of which examinations and surveys Congress had previously directed.

In this case, the Chief of Engineers has made a report on the Buzzard Roost development as a navigation project. The report was made to Congress after an examination and survey made under the direction of Congress and the recommendation is that "no improvement of this stream for navigation, either alone or in connection with power development, flood control, or irrigation, or any combination thereof, other than as authorized by existing projects, should be undertaken by the United States."

As a navigation project or river improvement, plainly it cannot lawfully be constructed under color of the authority of the National Industrial Recovery Act.

As a power project it cannot be brought under the commerce clause because it would be a strictly local enterprise and would engage solely in intrastate business. (R. 267, 175).

CONCLUSION

For the reasons set forth in our opening brief and in this brief, it is submitted that the decree of the Circuit Court of Appeals should be reversed, and the cause remanded to the District Court with directions to enter a decree for the petitioner permanently enjoining the respondents from using any funds of the United States to construct the electric power plant described in the bill of complaint.

Respectfully submitted,

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